92-2021

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

Ray G. Besing and Ray G. Besing & Associates, P.C.,
Petitioners,

v.

Home Insurance Company of Indiana,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

(1) Does a federal court have the judicial power over a case or actual controversy, pursuant to Article III, Section 2 of the Constitution, to grant a declaratory judgment, under the Federal Declaratory Judgment Act, to an insurance company that it is not liable under its malpractice policy issued to a lawyer, when (a) the lawyer's clients have not threatened or brought a malpractice suit and (b) the clients are not parties to the malpractice insurance contract?

(2) Can a federal court grant further relief under § 2202 of the Federal Declaratory Judgment Act, by awarding attorneys' fees to the plaintiff insurance company against the third party clients of the insured attorney, when (a) § 2202 does not provide for attorneys' fees and (b) the State in which the diversity court sits does not permit the insurance company to obtain declaratory relief against a potential third party claimant?

Parties to the Proceeding

The parties to the proceeding are Petitioners, Ray G. Besing & Associates, P.C., a Texas professional corporation, and Ray G. Besing, Individually, an attorney practicing in Dallas, Texas and Respondent Home Insurance Corporation of Indiana, an Indiana corporation.

Jack A. Moffitt, Jr., an attorney and a Co-defendant with Petitioners below, did not appeal the District Court's judgment below and is not a party to this proceeding.

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No. _____

IN THE

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October Term, 1992

Ray G. Besing and Ray G. Besing & Associates, P.C.,
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v.

Home Insurance Company of Indiana,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari

Ray G. Besing & Associates, P.C. and Ray G. Besing, Individually, pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on March 22, 1993.

Opinions Below

The opinion of the Court of Appeals, which is unreported, is set forth at Appendix A. The order and judgment of the District Court adopting the Magistrate's Report and Recommendation regarding the award of attorneys' fees is set forth at Appendix B. The Report and Recommendation of the U.S. Magistrate Judge is set forth at Appendix C. The Order of the District Court granting Respondent's motion for summary judgment, denying Petitioners' motion for stay or continuance, and granting Petitioners' motion to dismiss Respondent's cross-claim is set forth at Appendix D.

Jurisdiction

The judgment of the Court of Appeals was entered on March 22, 1993. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254(1).

Constitutional & Statutory Provisions Involved

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 2201(a) of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing-duty proceeding regarding a class or kind of Canadian merchandise, as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal rela-

> tions of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Section 2202 of the Federal Declaratory Judgment Act, 28 U.S.C. § 2202, provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Statement of the Case

Petitioners, an attorney and his professional corporation, hired Dallas attorneys in 1984 to bring suit for breach of a settlement agreement (*Besing v. Hawthorne*). That lawsuit was transferred to the state district court in Austin, Texas in 1986, requiring Petitioners to hire attorneys in Austin. Because the Dallas and Austin attorneys, which represented petitioners, committed malpractice in failing to file answers to interrogatories and in failing to conduct other required discovery, the Austin court entered a Global Sanctions Order in 1987, striking Petitioners' pleadings and entering an adverse final judgment in January, 1988. In addition, Petitioners' negligent attorneys failed to develop a record of the operative events in the trial court which caused the Texas Court of Civil Appeals to affirm the trial court's judgment.

Petitioners hired new counsel (Mr. Wall) to prepare and file a malpractice suit against the negligent Dallas and Austin attorneys (*Besing, et. al. v. Vanden Eyckle, et. al.*). In March, 1988, Petitioners filed petitions in bankruptcy, seeking protection from creditors under Chapter 11. Petitioner's bankruptcy attorney was Jack A. Moffitt, Jr., a Defendant below. Petitioners

and his trial counsel, Mr. Wall, wished to proceed with filing the *Vanden Eyckle* suit, but Moffitt advised them that Bankruptcy Act § 108 gave Petitioners a two-year extension of the state statute of limitations, measured from the date of filing the bankruptcy petition, thereby extending the limitations period to March, 1990. Upon giving such advice, Moffitt requested Petitioners and their trial counsel delay filing the *Vanden Eyckle* suit until the Bankruptcy Court had approved the reorganization plan for Petitioners and until after Moffitt filed and obtained rulings on objections to the claims of several of the malpractice attorneys for unpaid attorneys' fees.

The Plan of Reorganization was approved in late June, 1989. The statute of limitations expired in July, 1989. However, because of Moffitt's advice regarding the tolling effect of §108, Petitioners' trial counsel did not file the *Vanden Eyckle* suit until September, 1989. Promptly thereafter, the malpractice defendants in that action raised the defense of limitations, pointing out to the state trial court that Bankruptcy Act § 108 was not available to extend the statute of limitations period because the Bankruptcy Court's June 1989 approval of the Plan of Reorganization changed Petitioners status from debtors in possessin to debtors. The trial court granted the malpractice defendants' motion for summary judgment, based solely upon the limitations defense, in May, 1990.

Bankruptcy attorney Moffitt continued to represent Petitioners until approximately October, 1990 in an effort to reestablish the viability of the *Vanden Eyckle* suit. Because of Petitioners' need of Moffitt's assistance in trying to overcome his own negligence—and because of the hope that a reversal of the trial court's summary judgment in *Vanden Eyckle* would alleviate any necessity for suing Moffitt for malpractice—Petitioners informed Moffitt and his attorney (even after the filing of the suit by Respondent in the court below, in March, 1991) that Petitioners would not file a malpractice suit against

Moffitt unless and until that was absolutely necessary, *i.e.*, until the appellate process of the *Vanden Eyckle* suit finally came to rest (which event has not occurred). At no time did Petitioners threaten to file suit or file suit against Moffitt prior to the entry of a declaratory judgement by the District Court below.

On March 21, 1991, Moffitt's insurance carrier Home Insurance Company of Indiana, Respondent, filed a declaratory action against both Petitioners and Moffitt, seeking the District Court's declaration that Respondent had no potential liability under the insurance policy (and the renewal policy) it had issued to Moffitt in the event Petitioners might subsequently file a malpractice suit against Moffitt.

On April 23, 1991, the Court below entered a summary judgment in favor of Respondent, granting Respondent the declaratory judgment it had sought, and further, awarding attorneys' fees. (Appendix D). The Court referred the amount and reasonableness of Respondent's attorneys' fees claim to the U.S. Magistrate.

In a hearing before the Magistrate, the evidence established that Moffitt's own attorney in the District Court had been selected by Respondent and had been paid by Respondent through the declaratory judgment suit. Moffitt played an entirely passive role, including answering Respondent's discovery in a manner calculated to support Respondent's claims. It was also established that at no time did Petitioners file suit or threaten to file suit against Moffitt. Petitioners offered expert testimony that attorneys' fees should never be awarded for an insurance carrier against a third party, a potential claimant who might never file suit against an insured; and that, in any event, the amount of attorneys' fees sought by Respondent was excessive and unreasonable.

In his Report and Recommendation, the Magistrate recommended that the amount of $18, 486.10 constituted reasonable

attorneys' fees to be paid by Petitioners to Respondent's attorneys, along with $1,712.88 in expenses. (Appendix C).

The Court below entered its final judgment on September 22, 1992 adopting the Magistrate's recommendation. (Appendix B). The Fifth Circuit Court of Appeals affirmed the judgment of the district court. (Appendix A).

Reasons for Granting the Writ

The Circuit Court's affirmance of the District Court's determination that an actual controversy existed between Petitioners and Respondent is in direct conflict with Article III of the Constitution, the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the decisions of this Court, the Fifth Circuit Court, and other Circuit Courts.

1. The Fifth Circuit Court's holding that Respondent's declaratory judgment action was not premature because an actual controversy existed, is clearly erroneous.

A. There were no legal interests and no dispute between Petitioners and Respondent.

It was clearly error for the Fifth Circuit to hold that Petitioners' amicable negotiations with their bankruptcy attorney to resolve and settle the acknowledged malpractice problem created by the bankruptcy attorney, while the bankruptcy attorney continued to represent Petitioners, constituted an "actual controversy" between the bankruptcy attorney's *insurance carrier*, Respondent, *and the Petitioners* under the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. No "actual controversy" existed between Respondent and Petitioners because Petitioners were not a parties to Respondent's insurance policies issued to Moffitt; Petitioners did not directly seek recovery from Respondent under those policies, and, furthermore, Petitioners had not sued and could not sue the insured on those policies. If there was any actual controversy over the

interpretation of the insurance policies issued by the Respondent to the insured, it was a dispute only between those two.

If allowed to stand, the Fifth Circuit's opinion establishes an onerous policy which would allow any insurance company to sue any third party who potentially might have a claim against any of the insurance company's insureds. Such a policy clearly violates the prohibition in Article III, Section 2 of the Constitution that no court has jurisdiction unless a "case or controversy" exists. The Fifth Circuit's opinion will encourage litigation before any real dispute arises. For example, an insurance company that receives information that one of its insureds was involved in an automobile accident will be encouraged to race to the courthouse and file a declaratory judgment action against all parties to the accident, including third parties who have no contract with the insurance company, in order to (a) get a premature adjudication of an issue that may never arise; and (b) to exact the reward of being the first to file—recovery of attorney's fees.

The primary purpose of § 2201 is to allow one whose rights or obligations under a written document are in legitimate dispute to obtain an adjudication in order to avoid the accrual of avoidable damages before the adversary sees fit to begin suit. *United Food & Com. Workers v. Food Employers Council, Inc., 827 F.2d 519, 524 (9th Cir. 1987); Cunningham Bros., Inc. v. Bail, 407 F.2d 1165, 1167-68 (7th Cir. 1969); Sarafin v. Sears, Roebuck & Co.*, 446 F. Supp. 611 (N.D. Ill 1978). Here, however, Respondent could not incur any avoidable damages regardless of the time, if any, that Petitioners might (or might not) bring a malpractice claim against the insured, Moffitt. This is supported by the fact that the declarations which Respondent sought merely went to whether *potential* claims would be covered under the two insurance policies. By waiting until Petitioners chose, if ever, to file a malpractice action, Respondent could not have been prejudiced or damaged *by Petitioners*.

Furthermore, the declaratory relief which Respondent sought did not clarify any uncertainty of Respondent's rights or duties with respect to Petitioners, because an insurance company has no rights nor owes any duties to a third party who may make a claim against the insured, because there is no privity of contract between the two and the potential claimant has no cause of action against the insurance company. *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d 455, 460 (5th Cir. 1982). Simply, Petitioners could not have any actual controversy with Respondent.

In a previous interpretation of the Federal Declaratory Judgment Act, the U.S. Supreme Court has stated that the "case" or "controversy" requirement under Article III, Section 2 of the U.S. Constitution requires that a controversy "must be one that is appropriate for judicial determination," as "distinguished from a difference or dispute of a hypothetical or abstract character." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-41 (1937). See, also, *Rowan Companies, Inc. v. Griffin*, 876 F.2d 26 (5th Cir. 1989). In Aetna Life, this Court continued, "[t]he controversy must be definite and concrete, touching *the legal relations of parties having adverse legal interests*." *Aetna*, 300 U.S. at 239-241 (emphasis added). There is clearly no legal relation between an insurance company and a potential claimant against the insured; the claimant is not in privity of contract with the insurance company and has no right, direct or otherwise, to sue for enforcement of the contract. *Continental Oil*, 677 F.2d at 460; *see also Roland v. Allstock Ins. Co.*, 370 F.2d 289, 291 (5th Cir. 1966); *State Farm County Mut. Ins. Co. v Ollis*, 768 S.W.2d 722, 723 (Tex. 1989)

Based upon the above definition, the Supreme Court has mandated the following test:

> ...the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having ad-

> verse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). Ad., *Rowan*, 876 F.2d at 28; *Joslin v. Secretary of Dept. of Treasury*, 832 F.2d 132, 135 (10th Cir. 1987); *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1170 (3rd Cir. 1987); *Michigan Welfare Rights Organization v. Dempsey*, 462 F. Supp. 227, 230 (E.D. Mich., S.D. 1978).

In this case, there was no adverse legal interest between Petitioners and Respondent; and there was no difference, dispute or controversy between Petitioners and Respondent. Petitioners' bankruptcy attorney, Moffitt, notified his insurance carrier, Respondent, of the problem Petitioners had with his legal services in order to preserve coverage of any potential finding of malpractice. Legal liability insurance policies exclude prior acts so that, if Moffitt switched insurance carriers, Moffitt probably would not be covered by either carrier, if a malpractice claim was later filed.

In Texas, the statute of limitations is tolled in legal malpractice cases, pending the final outcome of the underlying litigation, here the *Hawthorne* suit and the *Vanden Eyckle* suit. *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991); *Gulf Coast Inv. Corp. v. Brown*, 821 S.W.2d 159, 160 (Tex. 1991); *Aduddell v. Parkhill*, 821 S.W.2d 158, 159 (Tex. 1991).

The purpose of this law is to prevent the client from facing the dilema of proceeding to sue his attorney for malpractice, before the two-year limitation period expires, when that lawyer is still representing the client in the underlying suit in attempts to salvage the client's case on appeal.

Yet, here, the client (Petitioners) face another dilemma: if they do not assert their claim during the insurance policy period, under a "claims-made-and-reported clause" in the insurance

policy, then Petitioners' possible malpractice suit against their attorney at the later time permitted by Hughes, et.al. will be ineffectual because the insurance company's duties to defend and pay have long since expired. Therefore, it is entirely likely that malpractice suits will be initiated several years after the termination date of any insurance policy that would have covered the acts giving rise to the malpractice cause of action. Thus, Petitioners were compelled to request that their bankruptcy attorney notify his insurance carrier of the malpractice problem, and therefore, a potential claim, in order to preserve coverage in the event a malpractice action was, in fact, filed at some point in the future. Until the appeals of the underlying litigation were exhausted, whether Petitioners might later file a malpractice action was dependent upon the outcome of the appeals pending in the underlying cases.[1]

Obviously, the declaratory judgment action initiated by Respondent was grossly premature, as the damage if any, to Respondent was purely hypothetical until the appeals in the underlying litigations were final and Petitioners had been damaged by adverse judgments.

When an individual "merely undertake[s] steps to maintain and preserve legal rights," a declaratory judgment action is not ripe for adjudication. *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986). "No matter how divergent the parties' views of their rights and obligations...may be," a declaratory judgment is premature. *Id.* In *Middle South*, an electric utility company sought declaratory relief in preventing the City of New Orleans from exercising its option in a franchise agreement to buy the utility. Despite the fact that the City of New Orleans had done just about everything in furtherance of exercising that option except formally exercising the

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[1] Indeed, the appeal in *Hawthorne* did not come to rest until December 7, 1989 and the Appeal in *Vanden Eykel* did not come to rest until December 9, 1992.

option, the Fifth Circuit found that no actual controversy existed. The court stated:

> Although considerable public-relations pugilism has been engaged in by both sides to bolster their respective bargaining positions, it would be imprudent indeed to base the determination of federal jurisdiction on such statements, which amount to *premature speculation concerning extreme positions that each side could adopt in the future*.

Id., at 491 (emphasis added).

In contrast, no legal dispute existed, at all, between Respondent and Petitioners at the time Respondent decided to file the declaratory judgment action in March, 1991. However, the court below attempted to distinguish the holding of *Middle South* on the basis that *Middle South* involved the "sensitive realm of public law." (Appendix A). Attempting to distinguish *Middle South* on such a basis has no relevance to the determination of the existence of an "actual controversy." Two parties either have an actual controversy or they do not. The mere fact that one party is a governmental entity is irrelevant to that determination.

For example, in the context of intellectual property cases, federal circuit courts have applied a two-pronged test for determining if an actual controversy exists. A declaratory plaintiff has the burden of proving:

> (1)...the declaratory plaintiff has a real and reasonable apprehension of litigation and (2) ... the declaratory plaintiff has engaged in a course of conduct that brings it into *adversarial conflict with the declaratory defendant*.

State of Texas v. West Publishing Co., 882 F.2d 171, 175 (5th Cir. 1989) (emphasis added). The court explained the test:

> The focus here is on the defendant's conduct that is directed toward the plaintiff...Traditional indicia of an objectively reasonable fear of litigation are direct threats by the defendant or a history of litigation between the parties
> ...While express or direct threats by the defendant are not essential to establish a plaintiff's reasonable fear of litigation, the plaintiff must allege a course of conduct that implies an *imminent threat of impending legal action* by the defendant.

West, 882 F.2d at 176 (citing *Crown Drug v. Revlon, Inc.*, 703 F.2d 240, 243-244 (7th Cir. 1983)). "[A]n asserted indirect, implied threat by "the declaratory defendant will not suffice. *Id.* at 177.

In this case, Respondent could not have had an objectively reasonable fear of litigation *against it* by Petitioners, because Texas law has refused to give a third party claimant against an insured a direct cause of action against an insurance company. *Continental Oil*, 677 F.2d at 460. In fact, a third party can only sue an insurer *after* he has obtained a judgment against the insured. *Roland v. Allstate Ins. Co.*, 370 F.2d 289, 291 (5th Cir. 1966); *State Farm*, 768 S.W.2d at 723. Petitioners had no judgment against Moffitt which they could attempt to enforce against Respondent; Petitioners had not even filed suit against Moffitt; and Petitioners had not even intended to file such a suit. Consequently, Respondent could have no objectively reasonable fear that a judgment or even a suit against it by Petitioners was imminent.

B. The Fifth Circuit's opinion is in direct conflict with other federal court decisions.

Petitioner has been unable to locate, and therefore believes, that neither the Supreme Court nor any Federal Circuit Court has ever held that an actual controversy exists between an insurance company and a potential third party claimant when

the potential third party claimant has not yet filed an action against the insured. In fact, the few cases that have dealt with this issue draw the conclusion that a declaratory judgment action is premature in these circumstances. *See, e.g. Plains Insurance Company v. Sandoval*, 35 F.R.D. 293, 296 (D. Colorado 1964); *Georgia American Insurance Company v. Johnson*, 712 F. Supp. 530, 531 (S.D. Miss. 1989). As Petitioners had not yet filed, and it was merely hypothetical whether Petitioners ever would file a malpractice action against Moffitt, the insured, the Fifth Circuit's holding that an actual controversy existed was clearly erroneous.

2. The Fifth Circuit's holding that the District Court properly awarded attorneys' fees in favor of Respondent to be paid exclusively by Petitioners is clearly erroneous under § 2202 of the Federal Declaratory Judgment Act.

The Federal Declaratory Judgment Act does not permit a Federal Court to award attorneys' fees. Rather, the Act merely states that "[f]urther *necessary or proper* relief...may be granted." 28 U.S.C. § 2202. The court below, nevertheless, concluded that, under *Mercantile Nat. Bank at Dallas v. Bradford Trust Co.*, 850 F.2d 215 (5th Cir. 1988), the availability of attorneys' fees in diversity cases is a question of state law. (Appendix A). However, in following *Mercantile* and applying state law, the Fifth Circuit clearly erred in awarding attorneys' fees against Petitioners in this case.

In *Mercantile*, the Fifth Circuit stated that a court can only award attorneys' fees under the Federal Declaratory Judgment Act in cases involving *bad faith or the like*. *Mercantile* at 218. The Magistrate's Report and Recommendation (Appendix C) does not remotely purport to find the existence of any such circumstances.

Furthermore, in deferring to state law on attorneys' fees, the Fifth Circuit misapplied the law of the State of Texas on the

availability of attorneys' fees in declaratory judgment actions. The award of attorneys' fees to Respondents clearly contradicts the settled law in Texas. Texas recognizes that no actual controversy exists between an insurance company and a third party who sues the insured, *National Sav. Ins. Co. v. Gaskins*, 572 S.W.2d 573, 575-576 (Tex. Civ. App.—Fort Worth 1978, no writ). Accordingly, under Texas law, attorneys' fees clearly would not be awarded to the Respondent insurance company in a State Court. Although the *jurisdiction* of a Federal Court is a question of federal law, when a Federal Court is required to apply state law in determining whether attorneys' fees are awardable, clearly the State's law and policy on whether declaratory relief is available in the same circumstances also must determine whether or not attorneys' fees are awardable (in the Court's discretion) under state law. Where Texas law clearly refuses to entertain a declaratory judgment action in the circumstances here, then, under Texas law, an award of attorneys' fees to a declaratory plaintiff cannot be allowed. Here, the Court below "picked and chose" indiscriminately among federal and state laws. The trial court, under diversity jurisdiction, cannot create a declaratory cause of action for Respondent against Petitioners when such a cause of action is prohibited by state law.

Consequently, the award of any attorneys' fees to Respondent, and imposed on Petitioners under a *Texas statute*, is a clear misapplication of Texas law and policy on awardability of attorneys' fees. Any amount awarded is unfair and unjust under § 2202.

Conclusion

Neither the Federal Declaratory Judgment Act nor the limitation of Article III, Section 2 of the Constitution considers the circumstances here to constitute the requisite actual controversy. Texas law prohibits the award of attorneys' fees because the law does not permit an insurance company to obtain

declaratory judgment against a third-party claimant, actual or potential. This Honorable Court should grant a Writ of Certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted,

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United States Court Of Appeals,
Fifth Circuit

HOME INSURANCE COMPANY, of Indiana,
Plaintiff-Appellee,

v.

JACK A. MOFFITT, JR., ET. AL.,
Defendants,

RAY G. BESING and
RAY G. BESING & ASSOC., P.C.,
Defendants-Appellants.

No. 92-1910
Summary Calendar

Appeal from the United States District Court for the Northern District of Texas ct (3:91-CV-0630-C)

Before JOLLY, DUHE, and BARKSDALE, Circuit Judges.

PER CURIAM:

Ray G. Besing and Ray G. Besing & Associates, P.C., appeal the district court's grant of declaratory judgment and award of attorneys' fees in favor of Home Insurance Company, of Indiana, pursuant to 28 U.S.C. §§ 2201-02. We AFFIRM.

I.

Home issued two professional liability insurance policies to Jack A. Moffitt, as the named insured; the policy periods ran consecutively from January 1989 through January 1991. Both policies contained a claims-made-and-reported provision[1], as

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[1] The claims-made-and-reported provision specified that Home agreed [t]o pay on behalf of the Insured all sums in excess of the deductible amount stated in the Declarations which the Insured shall become legally obligated to pay as damages as a result of CLAIMS FIRST MADE AGAINST THE

well as a provision that entitled Home to cancel Moffitt's policy for "[f]ailure to pay premiums when due". Because Moffitt failed to make payments to Imperial Premium Finance Company (Imperial), it requested that Home cancel the policy.[2] On September 12, 1990, Home issued a General Purpose Endorsement, returning the policy premium and cancelling the 1990-91 policy effective August 8, 1990. Moffitt negotiated the return premium check.

Earlier, in March 1988, before obtaining coverage with Home, Moffitt had been retained by Besing to represent him in Chapter 11 bankruptcy proceedings. Besing had also retained Jamie Wall to prepare and file a malpractice suit against Dallas and Austin attorneys (Vanden Eykel), who had represented him in an earlier state court action, Besing v. Hawthorne.[3] Moffitt, however, convinced Besing and Wall to delay filing the malpractice action until the bankruptcy court approved the Chapter 11 plan, stating that section 108 of the Bankruptcy Code extended the state limitations period by two years (*i.e.*, until March, 1990). The state court did not agree and, based on the defense of limitations, granted defendants' motion for summary judgment in May 1990.

INSURED DURING THE POLICY PERIOD AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD caused by any act, error or omission for which the Insured is legally responsible, and arising out of the rendering or failure to render professional services for others in the Insured's capacity as a lawyer or notary public.

[2] Moffitt gave Imperial a power of attorney that allowed it to cancel his policy for failure to make payments. Imperial provided Moffitt with notice of intent to cancel and notice of cancellation.

[3] The action concerned enforcement of a settlement agreement. According to Besing, his attorneys' negligence resulted in the rendering of an adverse final judgment in January 1988, subsequently affirmed by the Texas Court of Civil Appeals.

Moffitt continued to represent Besing. In September 1990, Moffitt inadvertently received an internal memorandum from Wall, referring to Besing's intent to assert a malpractice claim against Moffitt. In early October, Moffitt approached Besing about the possibility of settlement. In a confidential letter dated October 11, 1990, Wall relayed to Moffitt a "Proposed Settlement of the Malpractice Problem", stating that he and Besing had reviewed Moffitt's insurance policy and "are proceeding on the assumtion that there is malpractice insurance coverage for this claim".[4] Wall demanded that Moffitt notify his insurance carrier of Besing's claim, if he had not already done so, and request coverage and defense. Wall then set forth the following proposal:

> c. On the assumption that there is malpractice insurance coverage, Ray (Besing) and the P.C. have authorized me to accept in their behalf the compromise sum of $205,000 in full settlement. This amount represents one-half of the old, original Hawthorne damages of $410,555 .... The reason for this greatly reduced settlement offer is because Ray believes it is in everyone's best interest that this matter be put to rest so that the matters in Section A above

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[4] Wall stated,

> [W]e believe it is very likely that, while yourinsurance policy was in force,you were aware of either the possibility or probability of a claim being made by Ray [Besing]; and we believe it is very likely that you notified your insurance carrier before the policy lapsed. However, even if you did not notify the carrier, the carrier still may be required to pay, since it appears inequitable for a claimant to make or strongly signal his claim to the insured attorney but be deprived of the insurance coverage because the insured attorney either refused or neglected to notify the carrier ....

(Vanden Eykel litigation and Hawthorne case) can be pursued to conclusion;[5]

e. That, in the event it is later established that there is no insurance coverage under any malpractice insurance policy, then Ray and the P.C. will accept in full settlement the sum of $100,000....

By letter dated October 15, 1990, Moffitt notified Home of Besing's claim:

> Please be advised that I have had a claim asserted against me by Ray G. Besing & Associates, P.C., wherein the claimant contends his claim is covered by the above referenced policy. Enclosed please find a copy of my only correspondence regarding the claim and all attachments thereto.

Home filed suit in March 1991 against Moffitt, Besing, and Besing & Associates, P.C., requesting a judgment declaring, *inter alia*, that Moffitt's policies do not provide coverage for apppellants' claims. In support, Home maintained that the claims were "first made and reported" after the effective cancellation date of the 1990-91 policy.[6] Appellants answered and filed a cross-claim against Moffitt, requesting damages in excess of $400,000 for malpractice, and also asserted a counterclaim against Home, seeking coverage and benefits under Home's policies.

On April 23, 1992, the court granted Home's motion for summary judgment, and dismissed appellants; cross-claim.[7] It

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[5] Wall and Moffitt agree to jointly represent Besing on several bankruptcy matters involving Hawthorne, and others.

[6] Home also maintained that a "prior acts exclusion endorsement"provision excludes coverage because the basis for the claim occurred prior to January 11, 1989.

[7] In addition, the court denied appellants' motion for a stay, or alternatively, for a continuance, pending the Texas Supreme Court's ruling on

also granted attorneys' fees and costs to Home, pursuant to V.T.C.A. Civil Practice & Remedies Code § 37.009. In June 1992, appellants filed a response in opposition to Home;s proposed judgment, setting forth appellants, for the first time, asserted that the court should not entertain Home's declaratory judgment action because, *inter alia*, the claims could be more effectively adjudicated in state court.

By court order, a magistrate judge held a hearing to determine the proper amount of attorneys' fees and costs, subsequently awarding $18,486.10 in fees and $1,612.88 in expenses against appellants. Over appellants' objections, the district court adopted the report and recommendation and entered a final judgment granting Home declaratory relief and awarding it fees and costs. Moffitt did not appeal.

II.

A.

1.

Appellants contend that the district court lacked subject matter jurisdiction to grant declaratory relief.[8] "A federal court may not issue a declaratory judgment unless there exists an 'actual controversy', i.e., there must be a substantial controversy of sufficient immediacy and reality between parties having

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Besing's application for writ of error in the *Vanden Eykel* case. Appellants had asserted that their claim against Moffitt was simply, "to preserve their ability to obtain relief against Moffitt and under Moffitt's malpractice insurance policy in the event the Texas Supreme Court denied Besing's Application for Writ of Error in the *Vanden Eykel* case". The court concluded that the motions were without merit.

[8] Appellants failed to raise this issue before the district court; nonetheless, we may — indeed must — always examine the basis of our jurisdiction. *E.g.*, *Trizec Properties, Inc. v. United States Mineral Products Co.*, 974 F.2d 602, 604 (5th Cir. 1992).

adverse legal interests." *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir. 1986) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). In other words, a controversy is justiciable only where "it can presently be litigated and decided and not hypothetical, conjectural, conditional or based upon the possibility of a factual situation that may never develop". *Rowan Companies. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989) (*quoting Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665 (5th Cir. 1967)). If there is jurisdiction, whether to grant a declaratory judgment is within the sound discretion of the trial court; and we review only for abuse of discretion. *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983).

Appellants maintain that the controversy was hypothetical and not of sufficient immediacy because (1) Moffitt's malpractice liability had not been determined; and (2) appellants had not filed suit against him. According to them, Moffitt filed a claim with Home simply to maintain and preserve appellants' legal rights. We disagree.

The October 11 letter from Wall documented the negotiation of a settlement of Moffitt's malpractice liability. Moffitt conveyed a desire to settle; Besing responded with a specific proposal and requested that Moffitt file a claim with Home; and Moffitt did so. The proposal contemplated settlement prior to resolution of the underlying litigation; accordingly, we do not find Home's desire to defeat coverage to be premature.

Nor do we agree with appellants' reliance on *Middle South Energy, Inc.*, 800 F.2d at 489-90. There, new Orleans Public Service, Inc. (NOPSI), an electrical utility company, sought declaratory relief to prevent the city from exercising an option to purchase the utility. Because the actions of the City Council supported its testimony that it "ha[d] no present intent to purchase NOPSI's facilities, but ha[d] merely undertaken steps to maintain and preserve its legal rights under the option", we held

that there was no actual controversy. *Id.* at 490. In addition to the fact that *Middle South Energy, Inc.* involved the sensitive realm of public law, the case at bar is distinguishable because, here, the record does not support appellants' assertion that they were "merely taking steps to preserve their rights"; rather, it indicates that they were seeking immediate settlement.

And, finally, appellants' reliance on Texas state law is misplaced. Although state substantive law governs in this diversity action, justiciability is, of course, a federal issue to be determined by federal law. Accordingly, we find subject matter jurisdiction.

2.

Appellants contend that the district court abused its discretion in granting declaratory relief because relevant factors, such as judicial economy and public interest, militate against its issuance. They did not raise this issue before the district court until after the court granted judgment against them. The court did not explicitly address this contention in its judgment; we therefore assume that the court either chose not to consider appellants' belated argument or implicitly rejected it. In either event, the court did not abuse its discretion.

B.

1.

Appellants maintain that the award of attorneys' fees constitutes reversible error. We review for abuse of discretion. *Gulf Union Industries, Inc. v. Formation Security, Inc.*, 842 F.2d 762, 767 n.9 (5th Cir. 1988). The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, does not provide an independent basis for the award of fees; however, in a diversity action, the court may award fees if available under state law. *Mercantile Nat'l Bank v. Bradford Trust Co.*, 850 F.2d 215, 218 (5th Cir. 1988). Texas law so provides. *See* Tex. Civ. Prac. & Rem. Code §

37.009 ("[i]n any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just").[9]

Nonetheless, appellants assert that the award was improper because, under the Texas Constitution, no "controversy" exists between an insurer and a potential third party claimant. This contention has no merit. The inquiry is whether state law provides for the award of fees,[10] not whether appellants could have brought the action in state court. We also reject appellants' contention that the award is "unjust". The court properly considered the equities involved. It noted the "essentially offensive" posture of appellants as compared to Moffitt, and excluded fees and costs incurred prior to appellants' answer. The award was not an abuse of discretion.

2.

In addition, appellants contest the reasonableness of the amount awarded, contending that the fees are excessive in view of the "minimal routine activity by Home's attorneys". We review the award for abuse of discretion. Appellants' challenge is essentially a challenge to the subsidiary factual findings of the district court. They are reviewed for clear error. *Gulf Union Industries, Inc.*, 842 F.2d at 767 n.9.[11]

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[9] The referenced "chapter"provides for an action for declaratory judgment.

[10] As part of this inquiry, we question whether the language "under this chapter"is substantive state law; if so, an action brought solely pursuant 28 U.S.C. § 2201-02, may not fulfill state law requirements for the award of fees. *See Volpe v. Prudential Property and Casualty Insurance Co.*, 802 F.2d 1, 4-5 (1st Cir. 1986). We do not address this issue, however, because appellants do not raise it.

[11] Appellants' failed to object to the magistrate's findings and conclusions regarding the reasonableness of the award; however, they contend that our review should not be limited to plain error because the magistrate

Home presented itemized time records and submitted an affidavit that addressed each of the factors outlined in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). Based upon the evidence, the court found that "Plaintiff has carried its burden of establishing that the expenses and attorneys' hours expended were reasonable and necessary". Appellants fail to provide a basis for reducing the number of hours and we find none; accordingly, the court's challenged findings are not clearly erroneous.

C.

Appellants contend that the court erred in granting summary judgment; however, they fail to present this contention with requisite specificity.[12] We therefore consider it waived. *See* Fed. R. App. P. 28(a)(4), *Weaver v. Puckett*, 896 F.2d 126, 128 (5th Cir.), *cert. denied*, __U.S.__ , 111 S. Ct. 427 (1990).[13]

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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failed to properly notify them of the need to file objections within ten days. We note that appellants so filed, thus indicating they had actual knowledge of the filing requirements. Nonetheless, because the record does not adequately reflect that the magistrate provided appellants with sufficient notice we review for clear error. *See Rodriquez v. Bowen*, 857 F.2d 275, 277 (5th Cir. 1988).

[12] Appellants state, "[t]he affidavits and supporting exhibits of Mr. Besing and his trial attorney, Mr. Wall... contain facts which directly contradicted the skimpy summary judgment presented by Home".

[13] That appellants set forth an argument in the reply brief does not preclude a finding of waiver. We do not consider issues raised for the first time in a reply brief absent manifest injustice. *Najarro v. First Federal Savings and Loan Ass'n*, 918 F.2d 513, 516 (5th Cir. 1990).

B1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE HOME INSURANCE COMPANY
OF INDIANA,

Plaintiff,

v.

JACK A. MOFFITT, JR.,
RAY G. BESING, AND RAY G.
BESING & ASSOCIATES, P.C.,

Defendants.

Civil Action No.
3:91CV0630-C

ORDER

This case is before the court for consideratoin of the Besing Defendants' Objection to the Report and Recommendations of the United States Magistrate Judge filed September 14, 1992. The report and recommendation was filed September 2, 1992, pursuant to this court's order of reference dated July 1, 1992. Plaintiff has not filed an objection to the Report and Recommendation. After considering the Besing Defendants' objections and, pursuant to Rule 4(a)(2) of Appendix VI to the Local Rules of the Northern District of Texas, after making a *de novo* review of the matters raised by the Besing Defendants, the court is of the opinion that the magistrate's reprot and recommendation regarding the amount of attorney's fees and expenses to be awarded aainst the Besing Defendants should be adopted[1]

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[1] The court notes that plaintiff did not seek an award of attorney's fees against Defendant Moffitt. See Plaintiff's Original Complaint.

It is, accordingly, ordered that the Report and Recommendation of the United States Magistrate Judge filed September 2, 1992, is hereby adopted.

An appropriate judgment shall be entered accordingly.

The clerk shall furnish a copy of this order to each attorney of record.

Dated September 21, 1992.

/s/
SAM R. CUMMININGS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE HOME INSURANCE COMPANY
OF INDIANA,

Plaintiff,

v.

JACK A. MOFFITT, JR.,
RAY G. BESING, AND RAY G.
BESING & ASSOCIATES, P.C.,

Defendants.

Civil Action No.
3:91CV0630-C

JUDGMENT

This action came on for hearing before the Court, the Honorable Sam R. Cummings, District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered:

IT IS THEREFORE OREDERED THAT The Home Insurance Company of Indiana ("Home") is granted the following declaratory relief:

1. Policy No. F224811 (the 1989-90 Policy) and Policy No. F575254 (the 1990-91 Policy) do not provide coverage for the claims against Jack A. Moffitt, Jr. by Ray G. Besing and Ray G. Besing & Associates, P.C.

2. By virtue of the absence of coverage under the insurance policies, Home has no duty whatsoever to provide a defense to jack A. Moffitt, Jr. against these claims and Home is ot legally obligated to pay any sums under the policies in satisfaction of any judgment or settlement which may be rendered or entered into with regard to these claims.

IT IS FURTHER ORDERED THAT:

3. Plaintiff The Home Insurance Company of Indiana recover of the Defendants Ray G. Besing and Ray G. Besing & Associates, P.C., its reasonable attorneys' fees in the sum of $18,486.10 and expenses in the sum of $1,712.88, with post-judgment interest at the rate of 3.13 percent per annum from and after the date of judgment until paid, and its costs of action.

All relief not herein granted is expressly denied.

Dated September 21, 1992.

/s/
SAM R. CUMMINGS
United States District Judge

C1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE HOME INSURANCE COMPANY
OF INDIANA

VS.

JACK A MOFFITT, JR., ET AL

3-91-CV-630-C

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's order of reference filed on July 1, 1992, on September 1, 1992, came on to be heard Plaintiff's request for attorneys' fees. The magistrate judge has considered Plaintiff's request together with the affidavits and/or time records of Plaintiff's attorneys, the pleadings filed in this action, together with the testimony of James A. McCordquodale, Ray Besing and William Zook, and makes the following report and recommendation:

Plaintiff seeks recovery against Defendants Ray G. Besing and Ray G. Besing & Associates (Besing Defendants) its attorneys' fees and expenses in the sum of $26,102.24 pursuant to §37.009, Tex.Civ.Prac.&Re. Code. An examination of the time sheets reflecting the time expended, a description of the work performed and the attorney or paralegal assistant who performed the task, reflects that they are sufficiently detailed to permit the court to accurately determine whether such amounts were reasonable and necessary. *e.g. See Hensley v. Eckerhart*, 461 U.S. 424, 437 n. 12, 102 S.Ct. 1933, 1941 n. 12 (1983). Defendants presented the testimony of Mr. Zook who expressed the opinion that 199 hours of attorneys' time was unreasonable and that a more reasonable time expenditure was 90 to 100

hours. I am not satisfied that Mr. Zook's opinion should be accepted in lieu of the time records and affidavits presented by Plaintiff. Specifically, he testified that he has no professional experience in this type of declaratory judgment action. Nor am I convinced that he has reviewed the papers and pleadings in this action sufficient to be able to convincingly discount the hours reflected in Plaintiffs' attorneys' time records. Accordingly I find that Plaintiff has carried its burden of establishing that the expenses and attorneys' hours expended were reasonable and necessary.

The parties do not dispute that the hourly rates charged for the services of the listed attorneys and paralegal assistant are within the range of the customary rates charged by attorneys and paralegals in the Dallas area for the services rendered, based upon their respective levels of training and experience.

The lodestar figure for the attorneys' time is $24,071.00. In his affidavit, executed on May 13, 1992, James McCordquodale discusses each of the factors identified in *Johnson v. Georgia Highway Express*, 488 F.2d 714 (5th Cir. 1974). Id. at paragraphs 9-18 at pages 4-7. He concludes that none of these factors apply in the present case so as to warrant an upward or downward adjustment to the lodestar. This is a correct analysis and is adopted by the court.

§37.009, supra, provides as follows: "In any proceeding [for declaratory judgment], the court may award costs and reasonable attorney's fees as are equitable and just." Since 28 U.S.C. §2202 does not afford an independent basis for the award of attorneys' fees and this action was brought in federal court under its diversity of citizenship jurisdiction, the award of attorneys' fees is governed by §37.009, supra, *e.g. Titan Holdings Syndicate v. City of Keene, N.H.*, 898 F.2d 265, 273 (1st Cir. 1990); see also *Texas Commerce Bank v. Capital Bancshares, Inc.*, 907 F.2d 1571, 1575 (5th Cir. 1990).

Plaintiff has cited no cases in which a Texas court has awarded attorney's fees under §37.000 to an insurance company which sought declaratory judgment on the issue of liability under a policy issued by the company. My independent research fails to disclose any reported case which parallels the issues presented in this action.

In exercising discretion in determining an award which is "equitable and just", it is relevant to consider the fact scenario underlying this action. Plaintiff retained the services of counsel following a demand letter which was sent on behalf of the Besing Defendants to Jack A. Moffitt, Jr.[1] As reflected in the letter the availability of insurance coverage was a principal factor in the amount of any settlement (Id. at page 9). Plaintiff's contact with its counsel of record in this case commenced on October 30, 1990 (See Exhibit "A" attached to Affidavit of Mr. McCorquodale).

The decision to bring this action, at least in the first instance, was substantially for the benefit of Plaintiff. Viewed from the vantage point of when legal services were first commenced, a declaratory judgment in Plaintiff's favor would exonerate it from any liability under the terms of its policy to Jack A. Moffitt, Jr., as well as relieving it from any obligation to defenda [sic] in an action brought by the Besing Defendants against Moffitt. At the time Plaintiff filed suit in this action it was under no legal compulsion to do so. In my opinion it would be inequitable to award attorneys' fees to Plaintiff for its pre-litigation legal services and for filing suit simply because it had received no binding agreements from any of the defendants that exonerating [sic] it of any liability.

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[1] A partially redacted copy of the letter dated October 11, 1990, is attached as an exhibit to the Besing Defendants Motion to Stay Proceedings filed on March 12, 1992 (See Affidavit of Jamie Wall, Exhibit B-6).

As reflected in the record, unlike the original answer which Jack A. Moffitt, Jr., filed on April 19, 1991, admitting all of the facts alleged in the complaint, the Besing Defendants denied the facts alleged and raised affirmative defenses to the complaint in their answer filed on April 29, 1991. In addition, in its April 29, 1991, pleadings the Besing Defendants sought recovery of their attorneys' fees against them and a prayer for declaratory judgment declaring that the policies issued by Plaintiff to Moffitt remained in full force and effect.[2]

As distinguished from the essentially passive posture taken by Defendant Moffitt, the record reflects that from the time the Besing Defendants' initial pleadings were filed up until the District Court granted summary judgment in Plaintiff's favor, their litigation posture was essentially offensive or at minimum actively defensive. Joinder of issues and the District Court's scheduling orders necessitated Plaintiff's preparations for trial, in addition to moving for summary judgment and replying to the Besing Defendants' opposition thereto and opposing the Besing Defendants' cross-claim. All of these services were reasonably and necessarily incurred by Plaintiff. To require the Besing Defendants to reimburse Plaintiff for such services is both equitable and just.

CONCLUSION:

From the attorneys' fees and expenses produced by Plaintiff in support of its prayer for recovery of attorneys' fees and expenses under §37.009, supra, should be excluded attorneys' fees in the amount of $5,585.00 and expenses in the amount of $318.25 which represent fee and expenses incurred by Plaintiff on or before April 29, 1991.

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[2] The Besing Defendants never filed a motion to dismiss or a motion for summary judgment.

RECOMMENDATION:

For the foregoing reasons it is recommended that the District Court enter its order awarding attorneys' fees in the amount of $18,486.10 and expenses in the amount of $1,712.88 against the Besing Defendants.

A copy of this recommendation shall be transmitted to counsel for the parties.

ENTERED this 2nd day of September, 1992.

/s/ William F. Sanderson, Jr.
UNITED STATES
MAGISTRATE JUDGE

D1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

THE HOME INSURANCE COMPANY
OF INDIANA,

Plaintiff,

v.

JACK A. MOFFITT, JR.,
RAY G. BESING, AND RAY G.
BESING & ASSOCIATES, P.C.,

Defendants.

Civil Action No.
3:91CV0630-C

ORDER

This case is before the court for consideration of the plaintiff's motion for summary judgment filed January 6, 1992, the defendant's motion for stay or for continuance filed March 12, 1992, and the plaintiff's motion to dismiss the defendant's cross-claim filed March 12, 1992. The court has considered the motions, the written argument of counsel, the exhibits and affidavits submitted by the parties, and the record in this case. The court is of the opinion that the motion for stay or for continuance has no merit and should be denied, that the motion for summary judgment should be granted, and that the defendant's cross-claim should be dismissed pursuant to 28 U.S.C. § 1367(c)(2),(3).

Summary judgment is appropriate when the record reflects that there is no genuine issue as to any material fact and establishes that the movant is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P. When, as here, plaintiff has made and supported such a motion, an adverse party must set forth

specific facts showing that there is a genuine issue for trial. Rule 56(e), Fed.R.Cia.P. Defendants have failed to show that there is a genuine issue for trial in this case. Besing has asserted that it is unreasonable to believe the facts established by plaintiff's evidence, but he has failed to bring forth any evidence to refute those facts. Accordingly, summary judgment will be entered for the plaintiff.

This court has, at best, supplemental jurisdiction over the cross-claim of Besing. As noted in his motions for continuance, little discovery has been done on those issues. The issues in the malpractice case are all governed by Texas law. There is no reason for this court to retain jurisdiction over the cross-claim. Accordingly, it will be dismissed.

Plaintiff has requested and is entitled to its reasonable attorney's fees and costs in this case pursuant to Tex. Civ. Prac. & Rem. Code §37.009. Plaintiff shall supply affidavits and exhibits in support of its request for attorney's fees and costs and in compliance with *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) before 3 p.m. on Wednesday, May 13, 1992.

It is, accordingly, ordered that plaintiff's motion for summary judgment is **GRANTED**. Before 3 p.m. on Wednesday, May 13, 1992, Plaintiff shall submit a proposed form of judgment for entry after consideration of the attorney's fees issue.

It is, further, ordered that defendant's motion for stay or for continuance is **DENIED**.

It is, further, ordered that plaintiff's motion to dismiss Besing's cross-claim is **GRANTED** and that Besing's cross-claim is, hereby, **DISMISSED**.

ALL OTHER RELIEF REQUESTED IS DENIED.

The clerk shall furnish a copy of this order to each attorney of record.

Dated April 23, 1992.

/s/
SAM R. CUMMINGS
United States District Judge